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In the Supreme Court of the United States

October Term, 1943 - - - - - - - - Number 621

MINNESOTA MINING & MANUFACTURING COMPANY,

Appellant,

vs.

WISCONSIN DEPARTMENT OF TAXATION,

Appellee.

Reply Brief of Minnesota Mining and Manufacturing Company, Appellant.

I.

Notwithstanding appellee's argument, it is clear that the whole foundation and basis on which constitutional justification for the law and tax was predicated by this Court in *State of Wisconsin vs. J. C. Penney Co.,* 311 U. S. 435, has now been removed. No valid ground is suggested by appellee to support its jurisdiction to levy the tax involved on this appeal.

In our original brief we pointed out that the whole foundation and basis upon which constitutional justifica-

tion for the Wisconsin privilege dividend tax law and tax was predicated by this Court in *State of Wisconsin vs. J. C. Penney Co.,* 311 U. S. 435, has now been removed by reason of subsequent decisions in the Wisconsin Supreme Court authoritatively and finally construing the law as a privilege tax on the stockholder,—whereas this Court in the *Penney* case had sustained the law on the theory that it was a supplementary income tax on the corporation.

Appellee challenges our assumption as to the basis upon which this Court sustained the law and further challenges what seemed to us perfectly unqualifiably clear,—that the Wisconsin Court has unequivocally held the tax to be a privilege tax upon the *stockholder.*

Indeed, after reading appellee's brief, we have difficulty in determining the exact nature of the tax which appellee claims the instant law to levy. Appellee denies that this Court in the *Penney* case held the tax an income tax, although apparently it considers the tax to have been sustained on the theory that it was a tax against the corporation. Appellee further denies that the Wisconsin Court has held the tax to be against the stockholder. From this we must conclude that the appellee's contention is that the tax is a tax against the corporation and that it is a tax other than an income tax.

In our analysis of the matter, we insisted that there was a basic *conflict of construction* between that given the law by this Court in the *J. C. Penney* case and that later given it by the Wisconsin Court when the matter was presented to it. To summarily reflect this conflict of construction we submitted a tabular analysis on the insert following page 18 of our brief. Appellee vigorously criticizes this insert insisting that it is an unfair method of presentation, apparently on the theory that appellee contends we should also have included citation of *International Harvester Co. vs. Dept. of Taxation,* 243 Wis. 198. But there was nothing

in the *International Harvester Company* decision which in any way modified or changed or affected the determination of the Wisconsin Supreme Court that the tax was a privilege tax on the stockholder. The Wisconsin Court did in the *International Harvester Company* case make an attempt to reconcile the *decisions* of this Court in the *Penney* case with the decision of the Wisconsin Supreme Court. It did not however in any way whatsoever temper its *construction of the law* as a privilege tax on the stockholder, and indeed the same justice who wrote the opinion for the Court in the *International Harvester Company* case on the same day rendered the decisions in the *Wisconsin Gas and Electric Company vs. Dept. of Taxation*, 243 Wis. 216 and *Blied vs. Wisconsin Foundry and Machine Co.*, 243 Wis. 221, which unequivocally determined the tax to be a privilege tax upon the stockholder.

Appellee further argues the importance of any decision in this case as it may affect the fiscal affairs of the State, and cites in tabular form the amount of privilege dividend tax collected since the enactment of the law. Such table apparently reflects not only the tax collected in connection with dividends of foreign corporations but domestic corporations as well. There obviously would be some loss of revenue to the State of Wisconsin if the law is held unconstitutional with respect to dividends of foreign corporations. In every tax law which comes before a court for decision upon constitutional issues there is a question of possible loss of revenue involved, but that furnishes no legitimate reason for a court to hesitate to enforce constitutional provisions. The Legislature chose to enact this anomalous tax law and as we pointed out in our original brief, it appears to have been one of the express purposes of the act to cast a burden upon stockholders of foreign corporations, although there were well recognized means of collect-

ing revenue which might have been used and which still may be employed to fully recompense the state for any revenue lost as a result of this litigation. The advantages of a sound taxing system pursuant to which each state taxes that which is within its sphere and refrains from seeking sources of revenue which belong to its neghbors in order that the constituents of its legislators may be relieved of a burden which is rightfully theirs, are far stronger than any temporary inconvenience which may be caused by the striking down of any particular exaction. It is the very essence of the constitutional form of government that a statute which conflicts with constitutional safeguards must give way. (*Marbury vs. Madison*, 1 Cranch 137, 2 Law Ed. 60, 183.) The whole of the argument made by the appellee in this respect was concisely and accurately answered by Chief Justice Rosenberry in the original decision of the Wisconsin Supreme Court in *J. C. Penney Co. vs. Tax Commission*, 233 Wis. 286 at 297 wherein it said:

> "We are strongly urged to affirm the judgment in this case because the state treasury is dependent upon the maintenance of the right of the state to tax dividends of foreign corporations to the extent that such dividends are derived from earnings within the state. The matter of financial exigencies of the state, however, afford no justification for the ignoring of a rule of law laid down by the United States supreme court. *The state must find its revenues within the field within which its taxing power may be exerted as prescribed by the constitution and laws of the United States.*" (Italics ours)

See also *Helvering vs. Hallock*, 309 U. S. 106, 119, and 120.

Neither is there any merit in the appellee's contention that the re-enactment of the law by successive state legislatures in any way affects the issue now before this Court.

It is suggested by the appellee that the re-enactments of the law adopted the construction of the courts as an integral part of the statute the same as if written into it and that the statute should now be given such construction. A perfectly proper query might be made as to which decision affecting this law should be integrated into the statute,—whether the original decision of the Wisconsin Supreme Court in *State ex rel Froedtert G. & M. Co. vs. Tax Commission,* 221 Wis. 225, whether the decision in the original *J. C. Penney* case in the Wisconsin Supreme Court in 233 Wis. 286, whether the decision of this Court in the *Penney* case in 311 U. S. 435, whether the decision in the *Penney* case on remand in the Wisconsin Supreme Court in 238 Wis. 69 or whether one or all of the several decisions decided by the Wisconsin Supreme Court on June 16, 1943 referred to in our original brief. In any event, this argument of the appellant is addressed to the *construction* to be given the law and should properly be made only to the state court, in view of the fact that the law has now been unqualifiedly construed by the state court as imposing a privilege tax upon the stockholder. This Court must accept the statute as now authoritatively construed by the state court.

Nor, is there merit in appellee's contention that this Court in the *Penney* case sustained the law on the same basis as the Wisconsin Court did in the *Froedtert* case. There can be little question but that in the *Froedtert* case, the theory on which the tax was sustained was on the ground that Wisconsin retained a constructive situs of the earnings from Wisconsin traceable to the fund distributed by the dividend, and that because of this constructive situs Wisconsin has jurisdiction of the *res* which was the subject of the transfer, and had the power to tax this transfer irrespective of upon whom the burden of the tax rested. We submit that any fair reading of the decision of this

Court in the *J. C. Penney Company* case shows that the law was not sustained in this Court on any such basis. The distinctions in the theories followed seems clearly apparent when it is considered that under the theory employed by this Court the privilege dividend tax is valid only if it be construed as a corporate tax. This theory however cannot serve to sustain the tax if viewed as imposed upon the stockholders. On the other hand under the theory followed in the *Froedtert* case, the Wisconsin Court found it unnecessary to determine whether the tax was upon the corporation or the stockholder. For a law review article commenting upon the opinion of this Court in the *Penney* case which clearly points out the distinction between the theory followed by this Court and that followed by the Wisconsin Court in the *Froedtert* case, see 8 *University of Chicago Law Review*, page 605.

We thus submit that it is very clear that the foundation and basis of this Court's decision in the *Penney* case on which constitutional justification for the law was predicated has been removed by the subsequent Wisconsin decisions, and that an entirely new constitutional question is presented by the record in this case.

II.

There is clearly no merit in appellee's contention that the Supreme Court of Wisconsin did not hold the tax to be imposed upon the stockholder.

In an effort to bolster its jurisdictional argument, and with apparent realization that as a tax on the stockholder the jurisdictional basis of the tax is precarious, appellee argues from page 36 to page 42 of its brief that the Supreme Court of Wisconsin has not held that the tax is imposed upon the stockholder. Says the appellee at pages 36-37:

"In support of their assertion that this tax has been 'construed' by the Supreme Court of Wisconsin as a tax upon the stockholder, the appellant cites *Wisconsin Gas & Electric Co. vs. Dept. of Taxation* (1943), 243 Wis. 216, 10 N. W. 2, 104; *Blied vs. Wisconsin Foundry and Machine Co.* (1943), 243 Wis. 221, 10 N. W. 2, 142. Neither of these cases are to that effect.

In the first place the provisions of this tax law clearly provide that the corporation may deduct the tax from the dividends paid to stockholders. The Court thus did not and was not required to construe the statute, but merely gave effect to and applied the express provisions of it."

The appellee at page 38 of its brief criticizes counsel for the United States Government in Case Number 565, October Term, 1943, presently pending in this Court, entitled *Wisconsin Gas and Electric Co. vs. U. S.* for an assertion in their brief that the question involved in *Wisconsin Gas and Electric Co. vs. Dept. of Taxation, supra,* was whether the tax was on the corporation. In criticizing the assertion made by counsel for appellant in the instant case and for counsel for the Government in Case Number 565, October Term, 1943 of this Court, counsel has apparently overlooked the fact that on the motion for rehearing in the Supreme Court for the State of Wisconsin of the decision from which this very appeal was taken, that the State of Wisconsin by the same counsel which now represents it said at page 5 of respondent's brief opposing motion for rehearing:

"*It is immutably established by the Wisconsin Gas & Electric case (June 16, 1943) that the burden of the privilege dividend tax is upon the stockholder. Lest anyone question that the court actually so held, need we do more than to set out* the following statement in *that case:*

'We are certain of three things: (1) that the burden of the tax is specifically laid upon the stock-

holder; (2) that the corporation declaring the dividend must declare the tax from the dividend and may not under any circumstance treat the tax as a necessary expense of doing business; (3) that the power to levy the tax so construed was authoritatively established in the Penney case. It follows that appellant's contentions must fail.' " (Italics ours)

Can there be any question but that the same counsel who now attempt to argue that the Wisconsin Court has not determined the tax to be a tax upon the stockholdder, did not there dogmatically assert that the tax was held by the Wisconsin Court to be on the stockholder? Nor is there any reasonable question but that in the brief on motion for rehearing counsel for the state were correct in making such assertion.

We insist the question is not open to doubt and the Wisconsin Court has made a deliberate determination that the tax is against the stockholder and not against the corporation.

To argue as does appellee at page 37 of its brief that the Wisconsin Supreme Court in the case of *Blied vs. Wisconsin Foundry and Machine Co.*, 243 Wis. 221, did not hold the tax to be upon the stockholder, requires even greater intellectual ingenuity than to so argue about the *Wisconsin Gas and Electric Company* case. The issue in the *Blied* case was simple. The plaintiff, Blied, had preferred stock in a Wisconsin corporation. He was entitled to his full dividend. When the dividend was paid to him the corporation deducted the amount of the privilege dividend tax. He sued for recovery of the amount deducted claiming the tax was on the corporation and not on the stockholder. The Wisconsin Supreme Court, as pointed out in our original brief, denied the stockholder recovery. If ever a square holding could exist, holding the tax to be against the stockholder and not against the corporation, it clearly existed in the *Blied* case. If the litigant stockholder, Blied, was told

that the Court had not decided the tax to be against him, as appellee now asserts, he obviously would rightfully be in a quandry as to what the Court did determine. The fact that the *Blied* case involved a dividend of a domestic corporation rather than a foreign corporation, can make no conceivable difference in testing whether the incidence of the tax is upon the stockholder or the corporation. The same identical law, so far as liability for tax is concerned, is applicable to both.

Nor is there any conceivable merit to appellee's argument at page 40 of its brief that because liability for the tax is imposed upon the corporation, the incidence of the tax is upon the corporation. *There of course is no question but what the corporation is merely a collecting agent*, as was the National Bank in *Colorado National Bank vs. Bedford*, 310 U. S. 41 cited in our original brief, or as was the employer in *Travis vs. Yale Towne and Mfg. Co.*, 252 U. S. 60. The fact that the corporation is a collecting agent no more makes it a taxpayer than is an employer under the withholding phase of the current Federal income tax law. In a substantially similar type of withholding tax this Court in *U. S. vs. Railroad Co.*, 17 Wallace 322 at pages 326 and 327 said:

> "In the cases we are considering the corporation parts not with a farthing of its own property. Whatever sum it pays to the government is the property of another. * * * Whatever it thus pays to the government, it by law withholds from the creditor. * * * There is no pecuniary burden upon the corporation, and no taxation of the corporation. The burden falls upon the creditor. He is the party taxed * * *"

In the instant case exactly the same reasoning applies. After the declaration of a divend the stockholder becomes a creditor. Whatever sum the corporation deducts from the dividend and pays for the privilege dividend tax is the

property of another. There can be no question but what the stockholder and stockholder alone is the party taxed. There is almost no risk attached to the corporation, its liability as withholding agent to pay the tax exists only after the dividend is declared. The assertion by appellee at page 41 of its brief that if a corporation is not doing business in Wisconsin at the time of payment of the dividend, that the state can impose no tax is merely an assertion by counsel. The law makes no provision in connection with a situation of this sort. No decision of any court exists to support the statement. If the assertion is correct, it is so only because no enforcement exists for the collection. But such an argument has no persuasiveness in a determination of upon whom the tax burden rests in the instant case.

We resubmit as in our original brief, that there is no question but what the tax is a tax on the stockholder, and that the Wisconsin Court has unequivocally so determined. Appellee's arguments to the contrary are wholly without merit.

III.

Appellee suggests no valid ground under which the tax involved falls within the taxing jurisdiction of the State of Wisconsin. The only grounds suggested on which to predicate jurisdiction requires a complete and unwarranted disregard of the corporate entity and requires a repudiation of the principles involved by the unanimous decision of this Court in *Rhode Island Trust Co. vs. Doughton,* 270 U. S. 69.

We have searched appellee's brief in vain to find any logical suggestion on which it can be said that under the tax law as now authoritatively construed, jurisdiction exists in favor of Wisconsin to tax the transactions involved on this appeal. Appellee's argument on this phase of the case

is contained in Heading IV of its brief entitled: "The tax is clearly within the taxing jurisdiction of the State of Wisconsin."

The bulk of appellee's argument is predicated on the wholly erroneous *assumption* that the tax is a tax against the corporation and not against the stockholder, and with the elimination of this erroneous assumption, all of the suggested bases urged to sustain jurisdiction vanish, unless the corporate entity is wholly and completely disregarded.

We have no quarrel with several of the hypothetical statements made by appellee as to jurisdiction. The difficulty with such statements is that they do not fit into the tax pattern of the instant tax law except by a complete and unjustified emasculation of the statute, wholly contrary to the statute as now authoritatively construed by the Wisconsin Supreme Court.

While appellee approaches the matter from several different viewpoints in an effort to find grounds on which to predicate jurisdiction, we submit that all of the arguments urged finally revert back to the contention that the power to tax is based on the protection which Wisconsin offered in the acquisition of the earnings and an alleged protection of these earnings until distributed. We submit that the *whole* gist of appellee's contention is reflected in the following assertion from page 48 of its brief:

> "The jurisdiction to impose a tax upon foreign corporations is derived from the power to extract from corporate enterprises an exaction measured by Wisconsin earnings distributed to stockholders in the form of dividends. The power to impose this exaction arises by reason of the protection that the State affords in the acquisition of earnings that are distributed and the protection thereof until so distributed."

It is perfectly obvious that the "protection" which the state affords in the acquisition of the earnings is *protection to the corporation,*—for which the State has properly in the form of a *corporate* income tax exacted a price, and the corporate entity of the taxpayer has properly been scrupulously regarded for this purpose. But what protection has Wisconsin afforded to the *stockholder,* as distinct from the corporation, for which it can ask a return from the stockholder, at the time the stockholder receives the dividend from the foreign corporation? We submit that appellee suggests no such independent protection to the stockholder, and that none such exists. Appellee does definitely suggest that there is no constitutional reason why the corporate entity could not be disregarded and asserts among other things at page 51:

> "Even if this were a tax on the stockholders, there is nothing in the constitution which precludes its state legislature that permits corporations foreign and domestic to do business within the state, in the imposing of taxes on fruits thereof from looking through the corporate entity and imposing the tax upon the real beneficiaries when and as they realize such fruits and who enjoy such benefits in the precise amount by which the tax is measured."

Obviously the appellee in making that suggestion urges a complete disregard of the corporate entity solely in order to sustain the jurisdiction to impose the tax, even though the corporate entity was strictly regarded for the purpose of imposing an income tax at the time of the earnings of the very income involved. Appellee in making the above assertion further has apparently wholly disregarded the *unanimous* decision and holding of this Court in *Rhode Island Trust Co. vs. Doughton,* 270 U. S. 69, which held that the state of North Carolina could not levy an inheritance tax on shares in a New Jersey corporation owned by Rhode Island decedent, the tax being measured by that pro-

portion of the value of the shares that represented corporate assets in North Carolina as compared with total corporate assets. Virtually the same arguments to support the tax against the stockholder's estate were made in that case as in the present case. It was contended by representatives of the state of North Carolina that the beneficial ownership of the property rested in the stockholder,—that approximately two-thirds of the corporate assets were located in North Carolina and accordingly two-thirds of the value of the stock should be subjected to the North Carolina inheritance tax. It was further specifically contended that jurisdiction to tax existed because practically all of the profits that had accrued to the decedent from his ownership of shares accrued in North Carolina. This Court, in a *unanimous* decision by Chief Justice Taft, held that no jurisdiction existed in favor of North Carolina to impose such a tax and stated at page 81:

> "In this case the jurisdiction of North Carolina rests on the claim that, because the New Jersey corporation has two-thirds of its property in North Carolina, the State may treat shares of its stock as having a situs in North Carolina to the extent of the ratio in value of its property in North Carolina to all of its property. This is on the theory that the stockholder is the owner of the property of the corporation, and the state which has jurisdiction of any of the corporate property has *pro tanto* jurisdiction of his shares of stock. We can not concur in this view. The owner of the shares of stock in a company is not the owner of the corporation's property. He has a right to his share in the earnings of the corporation, as they may be declared in dividends, arising from the use of all its property. In the dissolution of the corporation he may take his proportionate share of what is left, after all the debts of the corporation have been paid and the assets are divided in accordance with the law of its creation. But he does not own the corporate property."

The Court further after reviewing the decisions of several courts, continued at page 83:

> "* * * But whatever the view of other courts, that of this court is clear: the stockholder does not own the corporate property. *Jurisdiction for tax purposes over his shares can not, therefore, be made to rest on the situs of part of the corporate property within the taxing State. North Carolina can not control the devolution of New Jersey shares.* That is determined by the laws of Rhode Island where the decedent owner lived or by those of New Jersey, because the shares have a situs in the state of incorporation. There is nothing in the statutory conditions on which the Tobacco Company began or continued business in North Carolina which suggests that its shareholders subjected their stock to the taxing jurisdiction of that State by the company's doing business there." (Italics ours)

Surely, the income of the nonresident stockholder from dividends declared and paid by a foreign corporation outside the state of Wisconsin is no more subject to tax than the certificates of stock themselves, on the ground that the business of the corporation in Wisconsin contributed in some degree to their amount or value. If the State of North Carolina which gave protection to two-thirds of the corporate assets of the corporation involved in the *Doughton* case and further gave protection to the earning of practically all the income of the corporation, did not have the jurisdictional right to impose a tax upon the devolution of the shares of stock in the corporation upon the death of a foreign stockholder of a foreign corporation, we submit that it follows *a fortiori* that Wisconsin has no jurisdiction to impose upon a foreign stockholder of a foreign corporation a tax for receiving dividends on the ground that Wisconsin gave the *corporation* protection in the earning of the income partially composing the dividend. This is especially true in view of the fact that the corporation has paid a tax for the privilege of earning the very earn-

ings involved, in the form of a general corporate income tax.

It is of course fundamental that once a dividend is declared it becomes a debt of the corporation and a shareholder becomes a creditor of the corporation.

> 11 *Fletcher Cyc. Corp.* (perm. ed.), Section 5322, page 786;
>
> 7 *Thompson on Corporations* (2d ed.), Section 5308, page 1831 *et seq.;*
>
> *Zinn vs. Germantown Farmers Mut. Ins. Co.,* 132 Wis. 86.

Upon collection of this debt such dividend of course becomes income in the hands of the stockholder. It is this income of a foreign stockholder of a foreign corporation upon which attempt is made to impose the privilege dividend tax. It ~~is~~ perfectly obvious that even if the tax could be sustained against the corporation it can not be sustained against the stockholder merely because a tax upon the corporation, having the same measure and rate, might be valid. (*U. S. vs. Railroad Co.,* 17 Wallace 322.)

Appellee's theory in effect leads to a contention that if jurisdiction exists to levy a tax upon the corporation it is equivalent in its effect to a tax upon the stockholder; and that accordingly the tax should be sustained upon the same theory. Appellee wholly disregards the holdings which were cited in our original brief in *Oklahoma vs. Wells Fargo,* 223 U. S. 298 and *Home Savings Bank vs. Des Moines,* 205 U. S. 503. An almost identical contention was made and rejected in the case of *Home Savings Bank vs. Des Moines,* 205 U. S. 503, wherein the Court held at page 519:

> "One other consideration only needs to be noticed. It is said that where a tax is levied upon a corporation measured by the value of the shares in it, it is equivalent in effect to a tax (clearly valid) upon the

shareholders in respect of their shares because, being paid by the bank, the burden falls eventually upon the shareholders in proportion to their holdings. It was upon this view that the lower court rested its opinion. *But the two kinds of taxes are not equivalent in law, because the State has the power to levy one and has not the power to levy the other.* The question here is one of power and not of economics. *If the State has not the power to levy this tax, we will not inquire whether another tax which it might lawfully impose would have the same ultimate incidence.*" (Italics ours).

Appellee cites no applicable authority in support of its argument on jurisdiction other than the purported authority of this Court in the *Penney* case and the Wisconsin Court in *State ex rel Froedtert G. & M. Co. vs. Tax Commission*, 221 Wis. 225.

Cases cited by the appellee such as *Graves vs. Elliott*, 307 U. S. 383, *Curry vs. McCanless*, 307 U. S. 357, *Bullen vs. Wisconsin*, 240 U. S. 625 are not authority to sustain jurisdiction in the instant case. In all of these three cases a decedent domiciled in one state set up a trust of intangibles with a trustee in a second state. In two of the cases the decedent reserved the power of revocation; in the third, a power to dispose of the corpus by will. In these cases this Court held that both the state of the decedent's domicile and the state of the seat of the trust might impose a succession tax. These cases involved taxation by the state of domicile and the state in which a trust is conducted, each of which is a sound basis of jurisdiction. No analogous basis exists in the instant case however. Neither is *Ford Motor Co. vs. Beauchamp*, 308 U. S. 331 cited by the appellee analogous. In that case there was merely involved a franchise tax *against the corporation* based in part upon the proportion of capital employed in the taxing state, calculated by a percentage of sales within the taxing state. This Court properly held that such a tax against the *cor-*

poration so measured is a proper "charge" for the protection given.

Even if it were assumed that the tax was a tax against the corporation and not against the stockholder there would still be no jurisdictional basis on which to predicate the tax. As pointed out in our original brief there must come a time when earnings lose their identity as income and become capital. Especially is this true after such earnings have responded to a corporate income tax of the state where earned. Wisconsin cannot tax wealth or the transfer of wealth after it has lost its identity as Wisconsin income any more than it can tax property before it become identified as Wisconsin property. Appellee apparently argues as the Supreme Court of Wisconsin originally did in the *Froedtert* case that the protection which Wisconsin gave to the acquisition of earnings *to the corporation* gave Wisconsin permanent jurisdiction to tax any transaction in which these earnings were involved, regardless of the place or time of the transaction. In short it is contended in effect that once protection is given to the acquisition of these earnings that they permanently retain a constructive situs for tax purposes within the state where earned.

If the rules suggested by appellee are sound it would mean that an excise tax on withdrawals from the St. Paul bank accounts of the appellant might be imposed by every state from which funds deposited in that bank account were derived; it would mean that all such states might levy sales tax upon the transactions involving such funds. It would seem to require that any state from which earnings composing a part of the corporate surplus were drawn could levy a stock transfer tax. In short if the contention were sustained there would be no practical limitation upon the types of transactions that might be taxed solely because the fund was originally derived from the taxing state.

The following language of this Court in *Connecticut General Life Insurance Co. vs. Johnson*, 303 U. S. 77, at page 81 is applicable to appellee's argument on this phase of the case:

> A tax " * * * is not converted into a valid exaction merely because a corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax * * *."

We submit that the appellee has suggested no theory upon which this tax can be jurisdictionally sustained either on the basis of authority of this Court or as an original proposition upon principle. To the contrary we submit that on principle no sound jurisdictional basis exists upon which to impose the tax, and that there is abundant authority which is cited in our original brief which militates against jurisdiction upon the record in this case.

IV.

If the tax could be sustained upon the jurisdictional grounds urged by the appellee, the tax is clearly unconstitutionally retroactive.

In an attempt to save the tax from the criticism that it is retroactive, the appellee shifts grounds as to the "jurisdictional fact" upon which the tax is based. On the jurisdictional argument, as we understood appellee's position, it was contended that the tax can be sustained primarily because Wisconsin had given protection to the earning of the income by the corporation which was ultimately used in the transaction of the dividends.

On the retroactivity phase of the case appellee attaches all important emphasis on the "*transaction*" which transaction admittedly takes place outside the state of Wisconsin and which transaction does not depend on the efficacy of Wisconsin laws on which to support it. The reasons

for appellee's position is obvious, inasmuch as the *transactions* occurred after the passage of the law.

If the tax as to a foreign corporation is justified because Wisconsin has given some protection to the earning of the income, to pass a law "charging", so to speak, for this privilege that may have been granted from five or ten or thirty years before, is to impose a hopelessly retroactive tax. In other words, Wisconsin in 1935, if the assessments in the case at bar are sustained, "exacts" a tax for the privilege of earning income in Wisconsin from the date the corporation first started to do business in Wisconsin, *regardless of when that date may be.*

Appellee further argues that the tax is no more retroactive than a tax upon a capital gain in the year of sale, but neither the Federal nor the Wisconsin income tax law attempts to impose a tax on a capital gain which occurred *before* the enactment of the income tax law. The Federal law accepts as the cost price for capital gain the fair market value as of March 1, 1913, the date of enactment of the federal income tax law. The State of Wisconsin accepts as the cost price for capital gain a fair market value as of January 1, 1911, the date of the enactment of the state income tax law. These dates presumably were accepted on the assumption that to take any other date would result in a vulnerably retroactive tax. In the instant case attempt is made to impose a tax for a privilege allegedly granted years before the enactment of the law so taxing.

Appellee further argues that as a tax on the stockholder the law is not retroactive and cites a series of Wisconsin income tax cases to the effect that a tax on a dividend in the hands of a stockholder declared and paid after the passage of the income tax law from surplus accumulated prior to the passage of the income tax law is not retroactive, because the dividend becomes income in the hands of the stockholder only on declaration and payment. But even

appellee has made no suggestion that the tax could be su tained *jurisdictionally* as an income tax on a foreign stoc holder of a forgein corporation, and obviously there is r jurisdictional basis to sustain the law on any such h pothesis.

We resubmit that it is perfectly clear that if the t is in any respect sustained on the theory that jurisdicti exists because of protection given to the earning of the i come, that the tax is clearly unconstitutionally retroacti

CONCLUSION.

It is respectfully submitted that for the reasons stat in our original brief that the decisions and judgment the Wisconsin Supreme Court should be reversed for t reason that the law as applied to the appellant is uncons tutional.

We further submit that appellee in its brief has not dicated any basis upon which the law and tax can be s tained.

Respectfully submitted,

JOHN L. CONNOLLY,
900 Faquer Avenue,
St. Paul, Minnesota,

and

G. BURGESS ELA,
One West Main Street,
Madison 3, Wisconsin,

Attorneys for Appellant.